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Sex Discrimination in Private Universities as State Action (Weise v. Syracuse University)

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CONSTITUTIONAL LAW

SEX DISCRIMINATION IN PRIVATE UNIVERSITIES AS STATE ACTION

Weise v. Syracuse University

Pursuant to 42 U.S.C. § 1983[1] a person who has been deprived of his constitutional rights under color of state law or custom may seek redress by instituting a civil suit for damages. While the statute is generally limited to acts of the states,[2] ostensibly private conduct can become the subject of a section 1983 claim if the government is so involved in supporting, promulgating, or otherwise condoning the private act as to make it, for all intents and purposes, the act of the state.[3] Whereas in most instances a substantial showing of state involvement in the private activity has been required to establish the necessary state action,[4] in *Jackson v. Statler Foundation*[5] the Second Circuit had concluded that in cases alleging racial discrimination application of a less stringent test for finding state action is warranted. More recently, in *Weise v. Syracuse University*,[6] the Second Circuit further expanded the scope of section 1983's

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[1] 42 U.S.C. § 1983 (1970) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] Because § 1983 finds the source of its authority in the fourteenth amendment, Williams v. Yellow Cab Co., 200 F.2d 302, 307 (3d Cir. 1952), *cert. denied*, 346 U.S. 840 (1953); Oppenheimer v. Stillwell, 132 F. Supp. 761, 763 (S.D. Cal. 1955), it, like the amendment, applies only to acts of the states and does not reach the misdeeds of private individuals. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3, 11 (1883).

[3] In Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), where a private restaurant was located in a state-owned building and operated in conjunction with a state parking facility, the Supreme Court concluded that the defendant's discrimination against blacks had indeed become the act of the state because "[t]he State [had] so far insinuated itself into a position of interdependence with [the defendant] that it must be recognized as a joint participant in the challenged activity . . . ." *Id.* at 725. Other cases illustrate that the requisite state action in § 1983 proceedings may take varied forms. *See, e.g.*, McQueen v. Druker, 438 F.2d 781, 785 (1st Cir. 1971) (pervasive oversight of private landlords); Fortin v. Darlington Little League, Inc., 376 F. Supp. 473 (D.R.I. 1974), *rev'd on other grounds*, 514 F.2d 344 (1st Cir. 1975) (financial support and physical upkeep of Little League).

[4] *See, e.g.*, Moose Lodge v. Irvis, 407 U.S. 163, 171-72 (1972); New York City Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856, 858-59 (2d Cir. 1975); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968); Pennsylvania v. Brown, 270 F. Supp. 782, 788 (E.D. Pa. 1967), *aff'd*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968).

[5] 496 F.2d 623, 628, *reconsideration denied*, 496 F.2d 636 (2d Cir. 1974) (en banc), *cert. denied*, 420 U.S. 927 (1975), *noted in* 49 ST. JOHN'S L. REV. 283 (1975).

[6] 522 F.2d 397 (2d Cir. 1975), *rev'g and remanding* Mortenson v. Syracuse Univ., 10 BNA Fair Empl. Prac. Cas. 1312 (N.D.N.Y. 1974) *and* Weise v. Syracuse Univ., 10 BNA Fair Empl. Prac. Cas. 1316 (N.D.N.Y. 1974).

protection by holding that the less exacting state action standard of *Jackson* may be employed where discrimination based on sex is alleged.

Selene Weise's application for a lecturer's position at Syracuse University was rejected in favor of that of an allegedly less qualified male. Although thereafter granted a teaching assistantship, she filed sex discrimination charges with the New York State Division of Human Rights[7] and the Equal Employment Opportunity Commission (EEOC)[8] against the University, its chancellor, and several other officials on the basis of their allegedly discriminatory denial of her application. Subsequently, Ms. Weise learned that her teaching assistantship would be terminated in accordance with a new University policy preferring masters candidates to doctoral candidates. Claiming that she was the only doctoral candidate affected by this policy,[9] Weise filed new charges of sex discrimination with the EEOC and consolidated them with her previous complaint.

Jo Davis Mortenson found herself in a similarly difficult position. After she had served as an assistant professor for 5 years, and at the same time that two allegedly less qualified males were retained, Dr. Mortenson's application for tenure was denied and her employment at Syracuse University terminated.[10] Notwithstanding the fact that a committee of the University senate, acting at Mortenson's request, agreed that the termination was effected without proper consideration of her qualifications, the English Department refused to reconsider its decision. As a result, Mortenson too filed charges of sex discrimination with the EEOC.[11]

Having received "Notices of Right to Sue" from the EEOC,[12]

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[7] The plaintiff's charges were filed with the New York State Division of Human Rights pursuant to N.Y. EXEC. LAW § 295(6) (McKinney 1972). That section empowers the agency to receive, investigate, and pass upon complaints alleging violations of the Human Rights Law, *id.* §§ 290 *et seq., as amended* (McKinney Supp. 1975), which proscribes, among other things, sex discrimination in employment. *Id.* § 296.

[8] The EEOC receives complaints in which unlawful employment practices are alleged pursuant to 42 U.S.C. § 2000e-5 (1970), *as amended,* (Supp. IV, 1974), which empowers the Commission to investigate and act upon such charges. Sex-based discrimination in the hiring or discharge of any individual has been expressly designated an unlawful employment practice. 42 U.S.C. § 2000e-2(a)(1) (1970).

[9] Ms. Weise alleged that a male doctoral candidate had his teaching assistantship renewed at the same time that her reappointment was denied. 522 F.2d at 402.

[10] *Id.* One professor was recommended for tenure and the other received an extension of employment without tenure. Unlike plaintiff Mortenson, neither possessed a doctoral degree or had any of his work published. In addition, the plaintiff's husband was granted tenure at this time and the University's hiring regulations prohibited the granting of tenure to both a husband and wife. *Id.*

[11] *Id.* at 403.

[12] When the EEOC either dismisses a charge of unlawful employment practices or fails

Weise and Mortenson independently brought actions in the district court alleging that Syracuse University deprived them of their constitutional rights in violation of 42 U.S.C. § 1983,[13] conspired to deprive them of equal protection of the laws in violation of 42 U.S.C. § 1985(3),[14] and discriminated against them in violation of Title VII of the Civil Rights Act of 1964.[15] Finding Title VII inapplicable to the cases at bar and insufficient state action to support the section 1983 and 1985(3) claims, the district court dismissed the complaints.[16] In *Weise* the Second Circuit consolidated the appeals[17] and reversed and remanded each for further proceedings.[18]

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to take action on the charge within 180 days of the date of filing, the complainant receives a "Notice of Right to Sue" and may bring a civil action against the respondent. Such an action must be commenced within 90 days of the receipt of notice from the Commission. 42 U.S.C. § 2000e-5(f)(1) (Supp. IV, 1974).

[13] The plaintiffs asked for declaratory and injunctive relief, punitive and actual damages, costs, and attorneys' fees. In addition, Weise sought appointment to the faculty at the University, and Mortenson demanded to be reinstated in her former position. 522 F.2d at 401.

[14] 42 U.S.C. § 1985(3) (1970) prohibits two or more individuals from conspiring to deprive any person or class of persons of equal protection of the laws.

[15] 42 U.S.C. §§ 2000e *et seq.* (1970), *as amended,* (Supp. IV, 1974). Sex-based discrimination in employment is expressly proscribed in *id.* § 2000e-2(a).

[16] *Mortenson,* 10 BNA Fair Empl. Prac. Cas. at 1314; *Weise, id.* at 1318. The district court dismissed the Title VII claims because it found that all the instances of discrimination alleged by the plaintiffs occurred prior to 1972 during which time educational institutions had been exempted from the Act's coverage. *Id.* at 1314; *id.* at 1318. The § 1983 claims were dismissed for lack of state action, and the § 1985(3) claims were dismissed both for this reason and on the additional ground that the plaintiffs had failed to adequately allege the requisite conspiracy. *Id.* at 1313-14; *id.* at 1318.

[17] 522 F.2d at 400 n.l.

[18] The district court's dismissal of the § 1985(3) claims for lack of state action and for failure to adequately allege conspiracy was reversed by the Second Circuit. The court found that the state action issue had been decided prematurely, but considered that finding irrelevant to a § 1985(3) claim since "[i]t is clearly established that § 1985(3) embraces a limited category of private conspiracies, and that there is no state action requirement." *Id.* at 408. As to the district court's ruling that the plaintiffs had failed to sufficiently allege conspiracy, the Second Circuit held that the plaintiffs' allegations were at least sufficient to survive defendant's motion to dismiss for failure to state a claim. *Id.*

The Second Circuit also reversed the district court's ruling on the Title VII claims. When originally enacted in 1964, Title VII exempted educational institutions from its purview. This exemption was removed, however, with the passage of § 3 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, *superseding* Civil Rights Act of 1964, § 702, Pub. L. No. 88-352, 78 Stat. 255 (codified at 42 U.S.C. § 2000e-1 (Supp. IV, 1974)). While the Second Circuit agreed with the lower court's determination that the initial acts complained of occurred prior to 1972, it found that both plaintiffs had also alleged instances of proscribed discrimination occurring in early 1973: the failure to consider Weise for a second teaching assistantship and the refusal to reexamine Mortenson's termination. 522 F.2d at 409-10.

More significantly, however, the plaintiffs urged the court, albeit unsuccessfully, to hold that where alleged acts of discrimination occurred prior to the removal of the exemption, Title VII should be applied retroactively. Their contention was based on the fact that the statute had recently been retroactively applied in Brown v. General Servs. Admin., 507 F.2d 1300 (2d Cir. 1974), *cert. granted,* 421 U.S. 987 (1975), where the federal government, which

In support of their claims the plaintiffs argued that the University was engaged in state action by virtue of the fact that it received state funds and abided by the state's general educational regulations.[19] Judge Smith, writing for a unanimous panel,[20] began by conceding that these indicia of government involvement would most likely be insufficient to support a finding of state action where a right other than sexual or racial equality is at issue.[21] Indeed, the *Weise* court recognized a line of cases which rejected claims of state action based on similar degrees of government involvement with private educational institutions.[22] The Second Circuit distinguished these decisions from the case at bar, however, by viewing them as academic disciplinary disputes involving first amendment rights.[23] More significantly, the panel concluded that state action holdings concerning one type of state involvement and a particular provision of the Bill of Rights are not necessarily dispositive of claims alleging other varieties of government involvement and seeking vindication of different constitutional guarantees.[24]

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had similarly enjoyed exempt status prior to the 1972 amendments, *see* Civil Rights Act of 1964, § 702, Pub. L. No. 88-352, 78 Stat. 255, *as amended,* 42 U.S.C. § 2000e-1 (Supp. IV, 1974), was the employer. The *Weise* court, however, found *Brown* distinguishable. The panel pointed out that while the original Title VII excluded the federal government from its definition of "employer," a proviso stipulated that it was the policy of the United States to refrain from discrimination in employment. Therefore, the court continued, anyone suffering job discrimination at the federal level could seek relief through administrative grievance procedures. 522 F.2d at 410. The 1972 amendments gave a private right of action to federal employees who were not satisfied with the resultant administrative decisions. While *Brown* admittedly provides for judicial review of formerly unreviewable administrative actions, in effect it is only giving federal employees an additional forum for the enforcement of a right they already had. *Id.* at 410-11. Although educational institutions, on the other hand, were also excluded from the coverage of Title VII prior to the 1972 amendments, employees of these institutions had no federal administrative remedy to pursue in instances of sex discrimination. *Id.* at 410. Since the clear intent of the amendments was to impose new substantive requirements on educational institutions, *id.* at 411, the *Weise* court reasoned that retroactive application of Title VII to the defendant would amount to an "*ex posto facto* imposition of civil liability." *Id.*

[19] The plaintiffs alleged that Syracuse University received a substantial amount of public funds from the state and federal governments through both direct grants and payments for services rendered under contracts. The state, moreover, was alleged to be extensively involved in the supervision and regulation of the University, although the record did not disclose the precise nature of this regulation. 522 F.2d at 404. Whereas the court recognized that the existence of federal involvement was irrelevant since § 1983 applies only to acts of the states, *id., citing* Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1346 (2d Cir. 1972), New York State's participation in the defendant's activities remained significant.

[20] Judges Oakes and Timbers joined in Judge Smith's opinion.

[21] 522 F.2d at 405. *See also* Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974), *cert. denied,* 420 U.S. 927 (1975).

[22] 522 F.2d at 403-04. For a discussion of the cases acknowledged by the *Weise* court as having involved similar degrees of state participation in the alleged misconduct of private educational institutions, see notes 39-44 and accompanying text *infra.*

[23] 522 F.2d at 405.

[24] *Id.* at 404, *citing* Wahba v. New York Univ., 492 F.2d 96, 100 (2d Cir.), *cert. denied,* 419 U.S. 874 (1974).

Recalling its previous decision in *Jackson v. Statler Foundation*,[25] where it was held that when the private conduct challenged involves racial discrimination the courts should be more willing to find state action, the *Weise* court ruled that sex discrimination is misconduct of a similarly offensive character and decided that a less exacting standard for determining state action should be applied.[26]

The proper test for establishing the requisite state action, Judge Smith continued, was also to be found in *Jackson*. According to that decision, the following factors should be examined when a state action claim is considered:

> (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function or acts as a surrogate for the State; [and] (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.[27]

Applying the *Jackson* criteria to the facts of *Weise*, the Second Circuit conceded that the fourth factor, serving a public function,[28]

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[25] 496 F.2d 623, 628-29 (2d Cir. 1974).

[26] 522 F.2d at 406. The court did acknowledge that the consequences suffered by the plaintiffs in two of the discipline cases were probably as serious as those involved in *Weise*. In Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973), the plaintiff law students were permanently expelled from the school despite their claim that the faculty had infringed upon their right to free speech by deliberately giving them failing grades in retaliation for certain controversial antiwar activities. Similarly, in Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), *cert. denied*, 419 U.S. 874 (1974), the plaintiff alleged violation of his first amendment rights after he was fired from the defendant's medical faculty due to a conflict with his superior over the publication of research findings. Nevertheless, the *Weise* court distinguished *Wahba* and *Grafton* on the ground that they did not involve invidious class-based discrimination. Rather, the activities affected in these cases, the grading of academic examinations and the conducting of scientific research, were matters which the panel deemed to be outside the realm of judicial competence and therefore unsuitable for resolution by a court. 522 F.2d at 406.

[27] 496 F.2d at 629.

[28] It has been suggested that when a private organization (or individual) performs what is essentially a public function, it forfeits its private character, assumes the mantle of state action, and becomes subject to those provisions of the Constitution governing the states. *See, e.g.*, Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (operation of a shopping center); Marsh v. Alabama, 326 U.S. 501 (1946) (operation of a "company town").

It has even been contended that because education is by nature a public function all educational institutions are engaged in state action. Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La.), *vacated sub nom.* Guillory v. Administrators of Tulane Educ. Fund, 207 F. Supp. 554 (E.D. La.), *aff'd*, 306 F.2d 489 (5th Cir.), *rev'd on retrial*, 212 F. Supp. 674 (E.D. La. 1962). The dispute in *Guillory* was generated by the racially discriminatory admissions policy of Tulane University. Claiming that it was a private institution beyond the reach of the fourteenth amendment, the defendant contended that it was free to discrim-

had been settled in favor of Syracuse University[29] and that the third factor, state approval as opposed to passivity,[30] also seemed to favor the defendant's position.[31] The first two factors, dependence on governmental aid[32] as well as the extent of governmental con-

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inate as it saw fit. Rejecting this argument, the district court initially ruled that the circumstances warranted a finding of state action. Since "education is a matter affected with the greatest public interest," 203 F. Supp. at 858, grave doubts were voiced as to whether any university could claim "private" status, unrestricted by the guarantees of the Constitution. Furthermore, the district court ruled that a finding of state action could also be justified on the basis of the state's involvement with the University. This involvement included Tulane's enjoyment of a tax exemption, its operation under a legislative franchise, its use of state lands, and the presence of three public officials on its governing board. *Id.* at 863-64. In reconsidering on retrial, however, the alleged indicia of state involvement set forth above, the district court concluded that they were insufficient to support the finding that the actions of the University were, in reality, those of the state. According to the court, that the state significantly influenced the operation of the University or its discriminatory admissions policy was not adequately demonstrated. 212 F. Supp. at 683-87. *See also* Van Alstyne, *The Judicial Trend Toward Student Academic Freedom,* 20 U. FLA. L. REV. 290, 291 (1968); Comment, *Student Due Process in the Private University: The State Action Doctrine,* 20 SYRACUSE L. REV. 911, 916-17 (1969) [hereinafter cited as *Student Due Process*].

In recent decisions, the Supreme Court has substantially limited the use of the public function theory. As the Court itself has stated, "the fact that government has engaged in a particular acitivity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions." Evans v. Newton, 382 U.S. 296, 300 (1966). In a subsequent decision, the Court went so far as to suggest that for a private activity to be deemed state action on the theory that a public function is being performed, the service offered should be one that the state is under an affirmative duty to provide. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-53 (1974). *See generally* 44 TUL. L. REV. 184 (1969).

[29] The plaintiffs also argued that Syracuse University was engaged in state action because of its involvement in the public function of education, a theory not without support. *See, e.g.,* Belk v. Chancellor of Washington Univ., 336 F. Supp. 45, 48 (E.D. Mo. 1970); note 28 *supra.* Nevertheless, having previously rejected the public function approach as applied to educational institutions, *see, e.g.,* Grafton v. Brooklyn Law School, 478 F.2d 1137, 1140 (2d Cir. 1973); Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968), the Second Circuit in *Weise* chose not to depart from its former position. 522 F.2d at 404 n.6. In so ruling, the panel appears to be in accord with Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353-54 & n.9 (1974), and Evans v. Newton, 382 U.S. 296, 300 (1966).

[30] The *Jackson* court had indicated that if state assistance and regulation are routinely extended to all members of a given private class, no basis for inferring the state's approval of the recipient's activities would exist. *See* 496 F.2d at 629.

[31] The record before the court contained no evidence that the State had in any way approved of the University's allegedly discriminatory policies. The panel explained that a different result could be reached if on remand it is established that the State had been involved in developing the antinepotism rule, which prohibited the granting of tenure to both a husband and a wife, complained of by Dr. Mortenson. 522 F.2d at 407. There was no suggestion of even the possibility that the State may have approved of the acts complained of by Ms. Weise.

[32] The receipt of state funds is a critical factor in determining whether or not state action is present. *See* Cohen, *The Private-Public Legal Aspects of Institutions of Higher Education,* 45 DENVER L.J. 643, 646 (1968) [hereinafter cited as Cohen]; Ruben & Willis, *Discrimination Against Women in Employment in Higher Education,* 20 CLEV. ST. L. REV. 472, 485 (1971). For example, the Ninth Circuit has ruled that where state funds are used by public schools to pay membership dues in the National Collegiate Athletic Association, the Association's acts with regard to these schools amount to state action. Associated Students, Inc. v. National Collegiate Athletic Ass'n, 493 F.2d 1251 (9th Cir. 1974). Similarly, the acts of a local Little League were deemed to amount to state action where the government owned and paid for the upkeep of the group's facilities. Fortin v. Darlington Little League, Inc., 376 F. Supp.

trol,[33] however, were issues which the court could not resolve without additional evidence.[34] As for the fifth and final factor, the court was "unable to say on this record that the University's claims to private status by themselves outweigh the particular offensiveness of the alleged misconduct."[35] Declaring that the district court should not have dismissed the complaints without first using the *Jackson* standard to determine the true extent of the state's financial and regulatory involvement, the Second Circuit remanded the case for further proceedings.[36]

Like its previous decision in *Jackson,* the Second Circuit's holding in *Weise* represents a significant departure from the consensus of judicial opinion regarding the facts necessary to sustain a finding of state action. As a general proposition courts have refused to construct any specific test or formula to be applied in determining precisely how much government involvement is necessary before a private act can be deemed an act of the state.[37]

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473 (D.R.I. 1974), *rev'd on other grounds,* 514 F.2d 344 (1st Cir. 1975). It should be emphasized, however, that the mere receipt of state funds usually does not, by itself, indicate the existence of state action. Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 547-48 (S.D.N.Y. 1968); *Student Due Process, supra* note 28, at 915. And, even where funding is just one of several ways in which the state is involved in a private activity, the courts will require proof of some causal connection between that involvement and the particular act in question. *See, e.g.,* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); Peterson v. City of Greenville, 373 U.S. 244, 247 (1963); Ward v. St. Anthony Hosp., 476 F.2d 671, 675 (10th Cir. 1973); Slavcoff v. Harrisburg Polyclinic Hosp., 375 F. Supp. 999 (M.D. Pa. 1974).

[33] The existence of substantial state regulation is frequently relied upon to establish state action. *See, e.g.,* Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970) (private college's enforcement of state-required regulations for maintenance of campus order). Nevertheless, here too, the governmental regulation must be connected to the activity in question. *See, e.g.,* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) (termination of plaintiff's electrical service by state-regulated utility); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968) (enforcement of college's disciplinary code).

[34] The parties sharply disagreed as to the precise amount of state funds received by the University. The defendant claimed that in 1973 state funds constituted only 3.6% of its operating budget, a figure the court indicated would not sustain a finding of state action. The plaintiffs, however, requested a hearing in order to demonstrate other sources of allegedly substantial state support. 522 F.2d at 407. The Second Circuit also found the record entirely lacking in evidence concerning the degree of control actually exercised by the state in the University's hiring practices.

[35] *Id.* at 408. The panel explained that when the private misdeeds of an educational institution infringe on an individual's civil rights, the harm caused to the public interest may compel the institution to forfeit its protected private status. *Id.* at 407. On the other hand, the court recognized the wisdom of preserving a private sector in society unfettered by those constitutional restrictions imposed on the states. *Id.* & n.13; *accord,* Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), *cert. denied,* 419 U.S. 874 (1974). *See also* 49 ST. JOHN'S L. REV. 283, 297 (1975). To mediate between these two conflicting concerns the *Weise* panel concluded that courts must employ a balancing process and weigh the actor's interest in retaining its private character against the need to protect the public from particularly odius and offensive conduct. 522 F.2d at 407.

[36] 522 F.2d at 408.

[37] The Supreme Court has made clear its view that the development of an inflexible, standardized test in the area of state action is impossible: "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed

In fact, the decisions clearly indicate that state action is to be determined on a case-by-case basis. Nevertheless, it is almost uniformly required that a finding of state action be predicated upon proof of some substantial involvement by the state as well as evidence of a direct causal connection between that involvement and the challenged activity.[38] In replacing these general principles of substantial involvement and direct causal connection with a specific five-part test applicable when the challenged misconduct is viewed as particularly odius and invidious, the *Jackson* and *Weise* decisions, it is submitted, have taken a questionable approach.

Courts, including the Second Circuit, have repeatedly rejected claims of state action based on degrees of state involvement with private colleges and institutions similar to, and sometimes even greater than, that alleged in *Weise*. In *Powe v. Miles*,[39] for example,

its true significance." Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961). *Accord,* McQueen v. Druker, 438 F.2d 781, 784 (1st Cir. 1971) ("we disavow any effort to be definitive"). *See also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 360 (1974) (Douglas, J., dissenting); Moose Lodge v. Irvis, 407 U.S. 163, 172 (1972); Evans v. Newton, 382 U.S. 296, 299-300 (1966); Cohen, *supra* note 32, at 647; Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity,* 74 COLUM. L. REV. 656 (1974) [hereinafter cited as *State Action*].

[38] It is clear that nominal state involvement with a private individual or institution will not warrant a finding of state action. As stated in a district court decision affirmed by the Third Circuit, "[t]he doctrine of State action must be subject to reasonable limitations. Quite obviously, the influence and beneficial activities of the state permeate virtually every area of human endeavor." Pennsylvania v. Brown, 270 F. Supp. 782, 788 (E.D. Pa. 1967), *aff'd,* 392 F.2d 120 (3d Cir.), *cert. denied,* 391 U.S. 920 (1968) (finding of state action warranted only if state significantly involved with the private conduct). *See also* Evans v. Newton, 382 U.S. 296, 299-300 (1966); Peterson v. City of Greenville, 373 U.S. 244, 247 (1963); New York Jaycees, Inc. v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Stock v. Texas Catholic Interscholastic League, 364 F. Supp. 362 (N.D. Tex. 1973); Furumoto v. Lyman, 362 F. Supp. 1267 (N.D. Cal. 1973); *State Action, supra* note 37, at 659-60.

Even a concededly significant degree of state involvement with the private actor, moreover, does not constitute state action unless that involvement bears a close relation to the allegedly wrongful act. For example, in Cohen v. Illinois Inst. of Technology, 524 F.2d 818, *rehearing and rehearing en banc denied, id.* at 830 (7th Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3474 (U.S. Feb. 13, 1976) (No. 75-1154), although a sufficiently substantial level of state support for the defendant educational institution had been alleged in order to warrant a state action finding, the court refused to make any such finding unless "that support had furthered the specific policies or conduct under attack." *Id.* at 825. Since plaintiff was unable to demonstrate any connection between the state's involvement and the gravamen of her complaint, *viz* sex discrimination in employment, the action was dismissed. *Id.* at 826-27. In accord with this holding is the Supreme Court's statement that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974). *Accord,* Moose Lodge v. Irvis, 407 U.S. 162, 172 (1972).

It appears, therefore, that since the state may be involved in some of the activities of a private individual or organization but not in others, it must be established that the action is related to those particular activities with which the state is directly connected before a § 1983 action may be maintained. *Cf.* Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

[39] 407 F.2d 73 (2d Cir. 1968). In *Powe* the Second Circuit wrestled with a § 1983 challenge to the disciplinary procedures at Alfred University. Although Alfred is a private

the Second Circuit refused to find state action when students in the College of Liberal Arts at Alfred University were suspended for having disrupted a military awards ceremony at the campus. Alleging that the College's rule prohibiting on-campus demonstrations denied them freedom of speech, the suspended students brought an action under section 1983. Although the record revealed that Alfred University abided by the state's educational standards and that one of its divisions, the College of Ceramics, was owned and funded entirely by the state,[40] the Second Circuit rejected the claim of state action since the College of Liberal Arts had only a minimal connection with the state. More particularly, the court ruled that the act complained of did not arise directly out of the state's involvement and indicated that as to the liberal arts division state action could only be found if the state had actually participated in promulgating or enforcing the rule in question.[41] Claims of state action based on general state funding and regulation of private colleges have been similarly rejected by the Fourth,[42] Sixth,[43] and Tenth Circuits.[44]

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institution, included as one of its divisions is The New York State College of Ceramics, a state owned and funded school which Alfred's officials administer pursuant to a contractual arrangement. Whereas the court sustained the claim of three Ceramics students that the University was engaged in state action when it subjected them to its disciplinary regulations, *id.* at 82-83, the complaint of four Liberal Arts students challenging the same disciplinary measures was dismissed. *Id.* at 81-82. The Second Circuit reasoned that the state was not involved with the Liberal Arts division and that the defendants, when acting with regard thereto, were acting as purely private individuals without any cloak of state authority. *Id.* This dual aspect of *Powe* has been the subject of criticism since, in effect, it holds that students in one division of Alfred University have access to constitutional guarantees while those in another do not. *See* O'Neil, *Private Universities and Public Law,* 19 BUFFALO L. REV. 155, 160-61 (1970); 44 TUL. L. REV. 184 (1969). Nevertheless, aside from the practical difficulties that it poses for Alfred University, the court's point seems well taken. The University administrators clearly act for the state in relation to the Ceramics College while these same officials operate in a purely private capacity with regard to the liberal arts division.

[40] 407 F.2d at 75, 81.

[41] *Id.*, *discussed in* note 39 *supra.* In Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973), the plaintiffs correctly argued that the defendant received state and municipal financial assistance and conformed to the academic requirements of New York's Commissioner of Education for Law Schools. Nonetheless, the *Grafton* court found that the school was not engaged in state action when it expelled a student for academic failure because the matter involved lie in the discretion of the faculty and could not be attributed to state involvement. *Id.* at 1143. In Wahba v. New York Univ., 492 F.2d 96 (2d Cir.), *cert. denied,* 419 U.S. 874 (1974), the Second Circuit again rejected a state action claim. There the plaintiff was fired from the staff of a scientific research project conducted by the defendant and funded by a government grant. The court reasoned that the state's involvement, no matter how extensive, was not responsible for the allegedly wrongful act, which, the court pointed out, resulted from a dispute between the plaintiff and his superior over the publication of research findings. Furthermore, the court warned against an excessive imposition of constitutional requirements on the private sector reasoning that this could dangerously restrict the freedom of movement and decision which the panel deemed vital to endeavors such as scientific research. 492 F.2d at 102.

[42] *See* Robinson v. Davis, 447 F.2d 753 (4th Cir. 1971), *cert. denied,* 405 U.S. 979 (1972)

The *Weise* court, nevertheless, found that the limitations placed on the state action doctrine in these decisions[45] were not controlling since they involved academic disciplinary disputes over the guarantees of the first amendment. Sex discrimination, said the court, was misconduct of a more serious nature justifying application of a less exacting standard.[46] This notion of a less exacting state action standard in sex discrimination cases, however, appears to be in conflict with several previous decisions. In *New York City Jaycees, Inc. v. United States Jaycees, Inc.*,[47] a case which managed to escape the attention of the *Weise* court although it was decided only 4 months earlier, the Second Circuit specifically rejected a claim of state action despite the fact that sex discrimination was the subject of the complaint. Seeking to enjoin the national and state organizations from revoking its charter because it had admitted women to membership,[48] the plaintiff, a local Jaycees chapter, claimed that the national organization was engaged in state action because it received more than 30 percent of its operating budget from government funds,[49] enjoyed a federal tax exemption,[50] and served a public function.[51] The panel ex-

(college and local municipality operated in interdependent fashion), *discussed in* Note, *Private Universities: The Courts and the State Action Theories*, 29 WASH. & LEE L. REV. 320 (1972).

[43] *See* Blackburn v. Fisk Univ., 443 F.2d 121, 122-23 (6th Cir. 1971) (university organized pursuant to state law had state tax exemption and was situated on property largely acquired through eminent domain).

[44] *See* Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969) (private university with state tax exemption extending to income derived from land not used for educational purposes).

In other cases where the courts have found that private colleges were engaging in state action, a substantially greater degree of state involvement was usually present and a direct connection between that involvement and the challenged acts could be found. Thus, for example, in Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970), where the state had specifically required the promulgation of disciplinary rules the enforcement of which was the subject of the complaint, its responsibility for the challenged action could be identified. Similary, in Smith v. Losee, 485 F.2d 334 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974), state action was found because the college was under the direct management and control of the state's educational authorities.

[45] *See* notes 39-44 and accompanying text *supra*.

[46] 522 F.2d at 406. Although the court noted that the interests affected in some of the discipline cases arose out of such delicate areas as the grading of academic examinations (*Grafton*) and the conducting of scientific research (*Wahba*), it regarded these disputes beyond the proper scope of judicial inquiry and simply not amenable to resolution by the courts. In comparison, the court found the question in *Weise* — "whether or not invidious discrimination has occurred" — to be "well within an area of recognized judicial competence . . . ." *Id.* at 406.

[47] 512 F.2d 856 (2d Cir. 1975). The unanimous opinion of Judge Hays was joined in by Judges Waterman and Mulligan.

[48] *Id.* at 857-58.

[49] *Id.* at 858. In contrast, the degree of state financial support initially alleged in *Weise* amounted to only 3.6% of the defendant's operating budget. 522 F.2d at 407.

[50] 512 F.2d at 858. As the *Weise* panel pointed out, federal involvement is entirely irrelevant to a state action claim. 522 F.2d at 404.

[51] 512 F.2d at 858. The *Weise* court fully discounted the public function argument as applied to Syracuse University. 522 F.2d at 404 n.6.

plained, however, that a mere showing of governmental "ties" to a private organization was insufficient and insisted that the plaintiff demonstrate some connection between the state's presence and the offending activity. Since the alleged government involvement had no relation to the defendant's discriminatory membership policies,[52] the court ruled that no state action finding could be supported.

Clearly, the *Jaycees* panel subscribed to the traditional state action requirements: substantial government involvement and a causal link connecting that involvement with the alleged misconduct. Nowhere in its opinion did the court suggest that the standard might be made less stringent because the complaint alleged sex discrimination. The Eighth[53] and Tenth[54] Circuits, moreover, dealing with virtually the same Jaycees' policies, similarly refused to find state action. Also instructive is the Third Circuit's opinion in *Braden v. University of Pittsburgh.*[55] As in *Weise,* the *Braden* plaintiff, seeking relief under section 1983, was a female professor who alleged sex discrimination in the defendant University's general employment practices. Although the Third Circuit reversed the district court's dismissal of the complaint and remanded the case for a further factual determination, the panel's decision was not predicated upon any reduction in the state action standard. On the contrary, the *Braden* court determined that the controlling test, once all the facts are in, is whether the state " 'has so far insinuated itself into a position of interdependence' with the University that it must be recognized as a joint participant in the challenged activity . . . ."[56] Equally significant is the opinion of the then Judge Stevens writing for the Seventh Circuit in *Cohen v. Illinois Institute of Technology.*[57] As in *Weise,* the *Cohen* plaintiff was a

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[52] 512 F.2d at 858-59. The *Jaycees* court explained that although government funds were used to support various Jaycees programs across the country, there was no connection between this funding and the sex discrimination complained of since women participated both in implementing these government-supported programs and in selecting local recipients for the aid. Furthermore, the benefits of these programs were distributed without regard to gender. *Id.* at 859.

> Plaintiff's constitutional challenge is addressed solely to the internal membership, policies of the Jaycees; yet plaintiff has made no showing that the government is substantially, or even minimally, involved in the adoption or enforcement of these policies.

Id. (footnote omitted).

[53] *See* Junior Chamber of Commerce v. Missouri St. Junior Chamber of Commerce, 508 F.2d 1031 (8th Cir. 1975).

[54] *See* Junior Chamber of Commerce, Inc. v. United States Jaycees, Inc., 495 F.2d 883 (10th Cir.), *cert. denied,* 419 U.S. 1026 (1974).

[55] 477 F.2d 1 (3d Cir. 1973), *rev'g and remanding* 343 F. Supp. 836 (W.D. Pa. 1972).

[56] 477 F.2d at 4, *quoting* Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

[57] 524 F.2d 818, *rehearing and rehearing en banc denied, id.* at 830 (7th Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3474 (U.S. Feb. 13, 1976) (No. 75-1154).

female professor who claimed that she had suffered sex discrimination when her application for tenure was denied by the defendant institution. Bringing suit under section 1983,[58] the plaintiff alleged the existence of state action in that the defendant used the word "Illinois" in its name,[59] received extensive public financial support,[60] and was subject to pervasive state regulation.[61] Like the *Jaycees* and *Braden* courts, however, the *Cohen* panel adhered to the requirement of a causal connection between the state's involvement and the alleged misconduct. Finding no such connection, the panel unanimously affirmed the district court's dismissal of the complaint.[62]

It appears, therefore, that the *Weise* panel's decision to apply a less stringent state action test in cases of discrimination based on sex is indeed questionable. In fact, the whole notion, first advanced in *Jackson,* of varying the state action standard according to the nature of the wrong alleged has been the subject of extensive debate. Although ultimately denied, en banc reconsideration of *Jackson* was favored by four Second Circuit judges.[63] Dissenting from the decision to deny reconsideration, Judge Friendly angrily denounced the *Jackson* state action test.[64] Finding little merit in the position that the standard should be relaxed for alleged racial discrimination, he based his opposition on the Supreme Court's decision in *Moose Lodge v. Irvis*[65] where a claim of state action was

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[58] The plaintiff simultaneously sought relief under § 1985(3), the conspiracy provision also relied upon by the *Weise* plaintiffs. The Seventh Circuit affirmed the dismissal of this action on the ground that the plaintiff had failed to allege the deprivation of a federally protected right. 524 F.2d at 828.

[59] The court found that the use of the name "Illinois" was of little significance since it had no bearing on the defendant's personnel policies. *Id.* at 824-25.

[60] The financial support alleged consisted of direct state grants to the defendant institution, state scholarships to its students, and the use of eminent domain to acquire property in the defendant's name. *Id.* at 823 n.9.

[61] The alleged state regulation governed the quality of academic courses, the reasonableness of fees, and the adequacy of facilities. The only regulations relating to faculty were those regarding academic credentials and competency to teach. *Id.* at 823-24 n.10.

[62] [T]he State's support of I.I.T. is sufficiently significant to require a finding of state action if that support has furthered the specific policies or conduct under attack. Again, however, there is no allegation in the complaint that the various forms of assistance given to I.I.T. . . . have had any impact whatsoever on the ability of Dr. Cohen, or any other member of her sex, to be treated impartially by the administration of the Institute.

Id. at 825. The *Cohen* court briefly discussed the *Weise* decision, but failed to offer an opinion as to the wisdom of the Second Circuit's holding. Although the court did suggest that a greater degree of dependence on state aid was alleged in *Weise* than in the case before it, the panel concluded that it "need not decide whether [it] would have ordered a trial of the *Weise* complaint . . . ." *Id.* at 827.

[63] 496 F.2d at 636. Judges Friendly, Hays, Feinberg, and Mulligan voted in favor of en banc reconsideration; Chief Judge Kaufman and Judges Mansfield, Oakes, and Timbers were opposed.

[64] *Id.* at 636-37. (Friendly, J., dissenting).

[65] 407 U.S. 163 (1972).

rejected despite the fact that the defendant had a state liquor license and was subject to certain state regulations.[66] By holding that state action can only be established when there is a substantial degree of governmental involvement directly connected to the challenged activity,[67] the Court seems to have rejected the notion that a reduced state action standard is appropriate in racial discrimination cases.[68] In view of this authority, the propriety of the *Jackson* decision is cast into serious doubt, and its offspring, *Weise,* becomes even more questionable. Furthermore, the purported premise for the use of a less stringent state action test is suspect since one may easily wonder why it is any more odius to discriminate against a person on the basis of his race or sex than it is to deny him his freedom of speech, press, or religion.[69]

Rather than rest its reversal on the seemingly clear indication that the Title VII violations dismissed by the district court were actionable,[70] the *Weise* panel broadly expanded the purview of section 1983. Originally enacted as a shield against the excesses of the states,[71] the statute, as applied by the *Weise* and *Jackson* courts, has become a means for redressing the alleged misconduct of what are essentially private institutions. The ultimate effect of such an application is the exposure of universities and other private entities to an imposing new array of civil liabilities.[72] However gratifying

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[66] In order to obtain a liquor license, the Lodge had to abide by the requirements of the Pennsylvania Liquor Control Board. This entailed making certain physical alterations, filing a complete membership roster with the Board, and maintaining detailed financial records. The Court ruled that no matter how extensive this type of regulation may be, "it cannot be said to in any way foster or encourage racial discrimination." *Id.* at 176-77.

[67] *Id.* at 173, 176-77.

[68] *See The Supreme Court, 1971 Term,* 86 HARV. L. REV. 74, 75 (1972); 49 ST. JOHN'S L. REV. 283, 286 (1975).

[69] One author has suggested that the "varying standard" approach to state action is merely used by the courts as a tool which enables them to take jurisdiction of interesting cases and avoid those that are more delicate and volatile. *See* 44 TUL. L. REV. 184, 189-91 (1969). Another commentator has noted that "to say that certain indicia [of state involvement] constitute state action for one purpose, but not for another, may be a way of concealing the court's idiosyncratic judgment of the desirability of the challenged practice . . . ." 81 HARV. L. REV. 1045, 1060 (1968).

[70] *See* note 18 *supra.*

[71] *See* Shelley v. Kraemer, 334 U.S. 1, 11-13 (1948); Civil Rights Cases, 109 U.S. 3, 11 (1883); Williams v. Yellow Cab Co., 200 F.2d 302, 307 (3d Cir. 1952), *cert. denied,* 346 U.S. 840 (1953); Oppenheimer v. Stillwell, 132 F. Supp. 761, 763 (S.D. Cal. 1955).

[72] In his dissenting opinion in *Jackson,* Judge Friendly described the potential effect of this new civil liability as "staggering." 496 F.2d at 638 (Friendly, J., dissenting). He indicated that if a finding of state action can be predicated on minimal state involvement, virtually every decision made by such private entities as charitable foundations and educational institutions could be subject to judicial scrutiny. As a result, these organizations may be forced to defend an endless parade of civil suits which would lead to a depletion of funds and a diverting of endowments away from the donor's intended purposes. *Id.* Similarly, in Wahba v. New York Univ., 492 F.2d 96, 102 (2d Cir.), *cert. denied,* 419 U.S. 874 (1974), the Second Circuit warned that the proposed extension of liability would unnecessarily tax the

this may be to civil rights advocates, it seems clear that such a result is simply not warranted by the weight of judicial authority. Hopefully, therefore, courts faced with similar circumstances will reject the ill-conceived theories of the *Jackson* and *Weise* opinions. Indeed, they would do better to bear in mind the simple maxim that "[t]he state action, not the private action, must be the subject of complaint."[73]

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FORESEEABLE CONSEQUENCE TEST FOR DE JURE SEGREGATION

Hart v. Community School Board

Since the 1954 Supreme Court decision in *Brown v. Board of Education,*[1] de jure segregation, *i.e.* that which is a product of intentionally segregative state action, has been held to be unconstitutional.[2] De facto segregation, on the other hand, has been viewed as permissible because of the absence of deliberate state involvement.[3] This very distinction has inevitably led to the problem of determining what types of action by a state will qualify

valuable time of a private institution's personnel in forcing them to repeatedly defend the propriety of their professional decisions.

[73] Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

[1] 347 U.S. 483 (1854).

[2] In *Brown,* Negro children sought admission to public schools on a nonsegregated basis. They had been denied admission to schools attended by white children pursuant to various state laws which either required or permitted segregation according to race. In sustaining the state's segregative policies, the lower courts had relied on the "separate but equal" doctrine announced by the Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896). The *Brown* Court, however, concluded that under the equal protection clause of the fourteenth amendment, "the doctrine of 'separate but equal' has no place." 347 U.S. at 495. According to the Court, "[s]eparate educational facilities are inherently unequal." *Id.*

[3] *See generally* Note, *Toward the Elimination of De Facto Segregation in Public Schools,* 20 CATHOLIC LAWYER 60, 61-64 (1974) [hereinafter cited as *Public Schools*]. Where there is no showing of state action, segregation has been upheld as de facto. In Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (5th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967), for example, the segregation of the Cincinnati Public School System was declared constitutional since no state action had been alleged. As the court noted,

> a showing of harm alone is not enough to invoke the remedial powers of the law. If the state or any of its agencies has not adopted impermissible racial criteria in its treatment of individuals, then there is no violation of the Constitution.

369 F.2d at 59.

In some cases, segregation has also been viewed as de facto, and therefore permissible, even when state action was present provided segregative intent did not exist. In Bell v. School City, 324 F.2d 209 (7th Cir. 1963), *cert. denied,* 377 U.S. 924 (1964), the Seventh Circuit sustained the constitutionality of a Gary, Indiana segregated school system. The court based its holding on a finding that the neighborhood school plan which had caused the segregation was "honestly and conscientiously constructed" by the school authorities. 324 F.2d at 213, *quoting* Bell v. School City, 213 F. Supp. 819, 829 (N.D. Ind. 1963).